No. 86-1750

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

SOUTHERN METHODIST UNIVERSITY,
Petitioner,

v.

CAROLE KNEELAND, BELO BROADCASTING CORPORATION,
A. H. BELO CORPORATION, DAVID EDEN,
THE TIMES HERALD PRINTING COMPANY,
NATIONAL COLLEGIATE ATHELETIC ASSOCIATION AND
SOUTHWEST ATHLETIC CONFERENCE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS DAVID EDEN AND THE TIMES HERALD PRINTING COMPANY

COUNSEL OF RECORD:
Robert P. Latham

Charles L. Babcock
Jackson, Walker, Winstead,
Cantwell & Miller
6000 InterFirst Plaza
901 Main Street
Dallas, Texas 75202
(214) 953-6000

Attorneys for Respondents,
David Eden and The Times
Herald Printing Company

July 2, 1987

QUESTION PRESENTED (RESTATED)

Did the Court of Appeals apply the proper standard in requiring a party seeking to intervene as of right under Fed. R. Civ. P. 24(a)(2) to show adversity of interest, collusion or nonfeasance on the part of the existing defendants when the proposed intervenor had the identical ultimate objective in the lawsuit as the existing defendants?

LIST OF PARTIES

The parties to the proceedings below who are parties herein are as follows:

1. Petitioner Southern Methodist University
2. Respondent Carole Kneeland
3. Respondent Belo Broadcasting Corporation
4. Respondent A. H. Belo Corporation
5. Respondent David Eden
6. Respondent The Times Herald Printing Company
7. Respondent National Collegiate Athletic Association
8. Respondent Southwest Athletic Conference

Additionally, William Marsh Rice University, which was also denied intervention in the District Court, was a party to the consolidated appeal below but has not petitioned for a writ of certiorari.

RULE 28.1 LISTING

Pursuant to Rule 28.1 of the Rules of the United States Supreme Court, Respondent The Times Herald Printing Company, a Delaware corporation, states that it is wholly owned by Dallas Newspapers, Inc., a Delaware corporation, which is in turn wholly owned by Gloucester County Times, Inc., a Delaware corporation.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS AND DAVID EDEN AND THE TIMES HERALD PRINTING COMPANY

Respondents David Eden and The Times Herald Printing Company respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Fifth Circuit's opinion in this case.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is styled *Kneeland v. NCAA,* 806 F.2d 1285 (5th Cir. 1987), and is reprinted as Appendix A to the Petition.

The memorandum opinions of the United States District Court for the Western District of Texas (Nowlin, J.) are also reprinted in the Appendix to the Petition.

RULE INVOLVED

Federal Rule of Civil Procedure 24(a)(2)

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action:
>
> . . .
>
> (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

Respondents incorporate by reference the statement of facts contained in the opinion below. However, Respondents wish to briefly supplement those facts as well as to comment on several of the "facts" contained in the Petition.

Petitioner, in its Statement of the Case, has included a vast amount of facts and arguments irrelevant to this case and to the question presented before this Court in particular. This case involves simply the request by Respondents and other media entities to the National Collegiate Athletic Association (the "NCAA") and the Southwest Athletic Conference (the "SWC") under the Texas Open Records Act ("TORA"), TEX. REV. CIV. STAT. ANN. art. 6252-17a (Vernon Supp. 1987),

for records relating to investigations of SWC member institutions. The case was originally filed in state court but was removed by the Defendants to United States District Court on the basis of federal question jurisdiction as Plaintiff also sought relief under 42 U.S.C. § 1983.

The question before this Court is limited to whether Petitioner was properly denied intervention as a defendant in that action. Petitioner's recitation of facts related to state court actions which have been dismissed or which do not involve the same issues is wholly irrelevant and only serves to cloud the issue before this Court.

The basis for Respondents' request for records under TORA is that the NCAA and SWC are supported in whole or in part by public funds of the State of Texas and are therefore "governmental bodies" as TORA defines that term. Accordingly, records collected, assembled or maintained by these voluntary associations in connection with the transaction of their official business are public, with the exception of those specifically made exempt from disclosure under TORA.

The Statement of the Case presented by Petitioners seeks to discredit the efforts made by the NCAA and the SWC to prevent disclosure of the records. To the contrary, the NCAA and the SWC have vigorously opposed disclosing the requested records at every step of the proceedings below. The NCAA and the SWC initially sought to defend on the basis that they were not governmental bodies as defined by TORA. By Order dated May 15, 1986, the District Court found, in the first phase of a bifurcated trial, that the NCAA and the SWC were indeed governmental bodies under TORA.

The NCAA and the SWC further raised statutory defenses regarding the actual disclosure of the documents and sought to invoke the exceptions enumerated in TORA. At the same time, the NCAA and the SWC put forth constitutional defenses regarding TORA's definition of public information, as well as

constitutional defenses involving privacy and freedom of association of themselves, their member schools (including Petitioner), their member schools' employees, boosters, students and recruits. There is no argument or defense which Petitioner seeks to raise which has not been put forth by the NCAA or the SWC. As stated by the court below, the NCAA and SWC "expressed all of [the] concerns" which Petitioner contends were not put before the court. (See opinion below, Petitioner's Appendix A, p. 9a).

The court below also noted that Petitioner has never shown in the District Court or the Court of Appeals that the NCAA or SWC has any interest which is adverse to the interest of Petitioner. The memorandum opinions of the District Court (attached as Appendices A-1, B, C and D to the Petition), and the opinion of the Court of Appeals demonstrate that each court below carefully considered the arguments and authorities and used the proper standard in applying the law to the facts before them.

REASONS FOR DENYING THE WRIT

Although the reasons supporting Petitioner's contention that a writ of certiorari should be granted are not easily gleaned upon reading its Petition in this cause, Petitioner apparently asserts that (1) a conflict exists among circuit courts as to the standard applied in a case where a party moving to intervene seeks the identical ultimate result as existing parties, (2) the opinion of the Court of Appeals for the Fifth Circuit is contrary to the decisions of this Court and (3) there is an inconsistent application of the standard for intervention as of right within the Fifth Circuit. Each of these assertions is wholly without merit.

I.

THERE IS NO CONFLICT BETWEEN CIRCUITS REGARDING THE STANDARD APPLIED WHEN THE INTEREST OF A PARTY SEEKING TO INTERVENE AS OF RIGHT IS IDENTICAL TO THAT OF EXISTING PARTIES IN THE LAWSUIT

As a basis for asserting that there is a conflict among the circuits, Petitioner seems to contend that the Fifth Circuit imposes the burden upon the proposed intervenor to demonstrate adversity of interest, collusion or nonfeasance on the part of existing parties having identical objectives, whereas other circuits merely examine whether the Applicant's interests are being "adequately represented" by the existing parties. Petitioner contends that the "adversity of interest" test employed by the District Court and the Fifth Circuit in this case is a standard different from that required under Rule 24(a)(2) of the Federal Rules of Civil Procedure.[1] This is simply not the case. The standard enforced by the Fifth Circuit when a party seeks to intervene tracks the language of Fed. R. Civ. P. 24(a)(2):

> It is well-settled that to intervene as of right each of the four requirements of the rule must be met: (1) the application for intervention must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; (4) the applicant's interest must be inadequately represented by the existing parties to the suit.

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[1] In its Petition, Petitioner makes repeated reference to Rule 24(a)(1) of the Federal Rules of Civil Procedure and states that the Rule Involved is 24(a)(1). Petitioner, however, quotes from 24(a)(2), and indeed it is subsection (2) of Rule 24(a) which establishes the adequacy of representation standard. For the purposes of this Brief, Respondents presume that Petitioner means Rule 24(a)(2) when it cites 24(a)(1).

Bush v. Viterna, 740 F.2d 350, 354 (5th Cir. 1984) quoting *New Orleans Public Service Inc. v. United Gas Pipe Line Co.,* 732 F.2d 452, 463 (5th Cir. 1984) (*en banc*). It is only when the party seeking intervention has the same ultimate objective as a party to the suit that "a presumption arises that his interests are adequately represented, against which the petitioner must demonstrate adversity of interest, collusion, or nonfeasance." *Bush v. Viterna,* 740 F.2d at 355. In other words, the adequacy of interest test is merely a further measure to determine whether or not the representation is adequate as required by Fed. R. Civ. P. 24(a)(2). It is not a standard that is inconsistent with Rule 24(a)(2) but instead helps tailor the 24(a)(2) standard to a situation where a party seeks the identical ultimate objective as the existing parties to the suit.

Petitioner has not disputed, and does not now dispute, that its interest in this case is *identical* to that of the NCAA and the SWC, i.e. nondisclosure of all of the requested records. The standard employed by the court below is by no means a unique or novel approach to the dilemma of insuring that all interests are before the court without overburdening or prejudicing litigants or the judiciary. There would be no effective limit on the number of parties that could intervene in a lawsuit if a party were allowed to intervene merely to echo the positions of the existing parties.

Consequently, the requirement that a party must show adversity of interest, collusion or nonfeasance in order to intervene in a lawsuit in which it seeks the identical ultimate objective as existing parties has been uniformly accepted and promulgated in *every* circuit. *See Environmental Defense Fund, Inc. v. Higginson,* 631 F.2d 738 (D.C. Cir. 1979); *Moosehead Sanitary Dist. v. S.G. Phillips Corp.,* 610 F.2d 49, 54 (1st Cir. 1979); *United States Postal Serv. v. Brennan,* 579 F.2d 188, 191 (2d Cir. 1978); *Hoots v. Pennsylvania,* 672 F.2d 1133 (3d Cir. 1982); *Virginia v. Westinghouse Electric Corp.,* 542 F.2d 214 (4th Cir. 1976); *Meyer Goldberg, Inc. of Lorain v. Goldberg,* 717

F.2d 290 (6th Cir. 1983); *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201 (7th Cir. 1982); *Corby Recreation, Inc. v. General Electric Co.*, 581 F.2d 175 (8th Cir. 1978); *Dilks v. Aloha Airlines, Inc.*, 642 F.2d 1155 (9th Cir. 1981); *Sanguine, Ltd. v. United States Dep't of Interior*, 736 F.2d 1416 (10th Cir. 1984) *cert. denied*, _____ U.S. _____, 107 S.Ct. 927 (1987); *Athens Lumber Co. v. Federal Election Comm'n*, 690 F.2d 1364 (11th Cir. 1982).

It would be hard to conceive of a standard with wider acceptance than the "adversity of interest" test which Petitioner seeks to challenge. Petitioner's assertion that there is a conflict among circuits is groundless.

Given that the standard applied by the Court of Appeals in this case is so uniformly accepted, the fact that intervention has been denied in some cases while granted in others is simply a result of the same standard being applied to different sets of facts. The cases cited by Petitioner in which intervention was granted all involve situations in which the court found that the prospective intervenor had indeed demonstrated adversity of interest, collusion or nonfeasance on the part of the existing parties. They did *not* involve the application of a different standard. In fact, the cases which Petitioner itself cites apply the very standard with which Petitioner takes issue!

Like the case at bar, each case cited by Petitioner depended upon its own facts. For instance, in *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983), the court found that there was sufficient adversity of interest to justify intervention since James Watt, the Secretary of the Interior who was purportedly representing the intervenor's interest on the defense side, had previously served as president of Mountain States Legal Foundation, the organization representing the plaintiff in the action.

In *Smith v. Pangilinan,* 651 F.2d 1320 (9th Cir. 1981), the court stated that since the United States Immigration and Naturalization Service is the sole determinant of who is entitled to United States citizenship, and since the Attorney General, William French Smith was responsible for enforcing the laws relating to immigration and naturalization, the Attorney General had an interest in a case in which citizenship determination was at stake which could not be represented by any other party. Neither of these cases is inconsistent with the decision of the court below and both involved application of the same standard used by the Fifth Circuit.

Perhaps the most puzzling use of authority by Petitioner is *Corby Recreation, Inc. v. General Electric Co.,* 581 F.2d 175 (8th Cir. 1978). Petitioner states that in *Corby* a property owner had leased property to the United States and was allowed to intervene in a suit against the United States when the lessor imposed additional lease restrictions. These, however, are not the facts of *Corby Recreation, Inc. v. General Electric Co.* In *Corby,* Western Realty Company, the owner of property leased to Corby Recreation, Inc. sought to intervene in an action brought by Corby against General Electric Company for damages caused by a fire to the subject property. Western further alleged that Corby was negligent and had breached its lease by underinsuring the property. The Court found that Western's negligence claim against Corby as well as the conflicting damage claims of Western and Corby established the requisite adversity of interest between Western and Corby to allow intervention by Western. The facts are not analogous to the case at bar.

Although Petitioner's premise is that the Fifth Circuit applied the wrong standard to its intervention, the authority Petitioner cites in no way supports such a claim. From its use of authority, it appears that Petitioner has abandoned its contention in the question presented to this Court and instead argues that although the Fifth Circuit applied the proper

standard, it should have determined that there was adversity of interest. Such an argument is not a proper ground for petitioning for a writ of certiorari.

The fact that Petitioner is itself uncertain as to what it is arguing is evident at pages 12 and 14 of the Petition where Petitioner states that the attorneys for the NCAA and SWC would violate ethical considerations if they attempted to represent Petitioner. The test is not whether the attorneys representing an existing party would be in a position to represent the intervenor, but rather whether the "same positions and defenses will be presented" with or without the intervenor. *Bush v. Viterna,* 740 F.2d at 357.

Conspicuously absent in the Petition is any authority indicating that there is a conflict among the circuits. Petitioner has merely selected cases from other circuits in which the facts happened to support a showing of adversity of interest. This authority in no way supports the contention that the Fifth Circuit applied the wrong standard. The simple fact of the matter is that Petitioner's interest in the lawsuit is identical to that of the NCAA and the SWC. The Fifth Circuit applied the proper and longstanding standard in such a case — a standard which has been embraced by *every* other circuit. Accordingly, a writ of certiorari should not be granted on the basis of a conflict among circuits.

II.

THERE IS NO CONFLICT WITH AUTHORITY OF THIS COURT

Petitioner also makes the vague assertion that the opinion of the Court of Appeals is contrary to decisions of this Court. The only Supreme Court case which Petitioner cites in an apparent attempt to support this proposition is *Trbovich v. United Mine Workers,* 404 U.S. 528 (1972). However, the

opinion below is perfectly consistent with this court's opinion in *Trbovich.* In trying to match Petitioner's use of authority to its initial premise, it appears that Petitioner may be relying upon *Trbovich* for two propositions: 1) that the court below allocated the burden of proof improperly and 2) that the court below failed to find adversity of interest between a regulatory agency and a regulated party. Respondents will address these two issues in turn.

In *Trbovich,* this Court held that although the burden of showing that representation by existing parties may be inadequate is minimal, that burden is nevertheless on the party seeking intervention even after the 1966 amendment to Rule 24. The court below recognized the *Trbovich* standard but simply held that on the basis of the facts presented, Petitioner had failed to make even that minimal showing.

It is remarkable that Petitioner contends that the 1966 amendment to Rule 24(a) changed the burden of proof from the party seeking intervention to the party opposing intervention, yet, in the very same Petition, cites *Trbovich v. United Mine Workers,* which clearly places the burden upon the party seeking intervention. Furthermore, the cases cited on pages 21 and 22 of the Petition discussing other circuits' treatment of intervention cases also indicate that the burden of proof is upon the party seeking to intervene. *See e.g. Sanguine Ltd. v. U.S. Department of Interior,* 736 F.2d at 1419 ("Applicant for intervention as of right bears the burden of showing inadequate representation . . ."); *Sagebrush Rebellion, Inc. v. Watt,* 713 F.2d at 528 (Applicant must show "that representation of its interest 'may be' inadequate and . . . the burden of making this showing is minimal"). *See also* 3B, Moore's Federal Practice ¶ 24.07[4] (2d ed. 1982).

Even if the burden were on the party opposing intervention, the standard employed by the Fifth Circuit would be consistent with such a burden. The party opposing intervention

would meet its burden by showing that the interests of the applicant and the existing parties are identical. The burden would then shift back to the applicant to show adversity of interest. So regardless of whether the initial burden to show adequacy of representation is on the applicant or the party opposing intervention, the burden of showing adversity of interest is on the applicant.

There is also no inconsistency between the opinion of the court below and *Trbovich* with regard to regulatory bodies representing regulated parties. The conflict noted by this Court in *Trbovich* stems from agency attempts to represent regulated parties and yet serve the public interest at the same time. The NCAA and SWC are not such regulatory agencies vested with a statutory responsibility to serve the public interest. They are private voluntary associations. As the court below noted, the conflict recognized by this Court in *Trbovich* simply does not exist "between the regulated universities and the voluntary associations in this case." *Kneeland v. NCAA,* 806 F.2d at 1288.

Clearly, there is no conflict between the Court of Appeals' decision below and decisions of this Court. A writ of certiorari should therefore not be granted on this basis.

III.

THERE IS NO INCONSISTENT TREATMENT OF INTERVENTION CASES WITHIN THE FIFTH CIRCUIT

Petitioner's assertion that there is an inconsistent application within the Fifth Circuit as to the standard applied under Rule 24(a)(2) is equally vague and unsupported. To the contrary, the Fifth Circuit has been clear and consistent in its application of the standard which a party must meet in order to be entitled to intervention. When the ultimate objectives of the parties seeking intervention and the existing parties are identi-

cal, "the presumption arises that the interest of the intervenor will be adequately protected by [the existing parties]." *Ordnance Container Corp. v. Sperry Rand Corp.*, 478 F.2d 844, 845 (5th Cir. 1973). *See also International Tank Terminals, Ltd. v. M/V Acadia Forest,* 579 F.2d 964 (5th Cir. 1978);. *Bush v. Viterna,* 740 F.2d 350 (5th Cir. 1984).

Once again, it is difficult to ascertain what authority Petitioner attempts to use to support its claim of inconsistency in Fifth Circuit decisions. Respondents believe that, as in the Court of Appeals, Petitioners are trying desperately to make some use of the cases *Jones v. Caddo Parish School Bd.*, 499 F.2d 914 (5th Cir. 1974) and *Adams v. Baldwin County Bd. of Educ.*, 628 F.2d 895 (5th Cir. 1980), in which the parties seeking to intervene were afforded evidentiary hearings. The application of those cases, by their express terms, is limited to suits involving school desegregation. The cases do not represent an inconsistent application of the standard for intervention within the Fifth Circuit. As the court below correctly noted, "[s]chool desegregation cases are unique in requiring evidentiary hearings on motions to intervene." *Kneeland v. NCAA,* 806 F.2d at 1289. Furthermore, the court held that even without an evidentiary hearing, the record was adequate to clearly demonstrate that Petitioner is not entitled to intervene. *Id.*

Petitioner's contention of an inconsistent application within the Fifth Circuit is insupportable. Furthermore, Petitioner is not entitled to an evidentiary hearing.

IV.

THE ISSUES PETITIONER SEEKS TO PUT BEFORE THE COURT HAVE BEEN ASSERTED BY THE NCAA AND THE SWC

Petitioner argues that it should be allowed to intervene in order to assert its property rights, right to privacy, freedom of association, academic freedom and the so-called privilege of self-critical analysis. In the first instance, each of these arguments is tenuous at best. The authorities cited are inapposite to Petitioner's arguments in these areas and have no application to this case[2] or in this context.

More importantly, though, each of the arguments Petitioner seeks to assert was indeed advanced by the NCAA and the SWC, both for themselves and their member institutions. As noted by the court below, *Kneeland v. NCAA,* 806 F.2d at 1288, under Texas law the NCAA and the SWC have standing to raise any defenses to disclosure their members could raise. *Industrial Found. of the South v. Texas Indust. Accident Bd.,* 540 S.W.2d 668, 678 (Tex. 1976), *cert. denied,* 430 U.S. 931 (1977). The fact that the NCAA and the SWC vigorously put forward such imaginative defenses demonstrates the thoroughness with which both the NCAA and the SWC sought to protect against disclosure of the requested documents.

Rule 24(a)(2) is specifically designed to prevent against numerous parties intervening in a lawsuit merely to echo the arguments of existing parties. Such a policy is particularly important in the area of litigation concerning access to public records. If every person or entity who is referenced in public records or once had possession of public records were allowed to intervene as of right, the number of potential litigants would

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[2] The one case upon which Petitioner relies for its freedom of association theory is cited by Petitioner as *NCAA v. Alabama,* 357 U.S. 449 (1958). The case, however, is *NAACP v. Alabama.*

be infinite and no meaningful resolution of the disclosability of public records could be reached. In fact, this Court has rejected claims that open records acts create third party rights to prevent disclosure. In *Chrysler Corp. v. Brown,* 441 U.S. 281, (1979), this Court ruled that parties submitting information, such as Petitioner, have no standing under the Freedom of Information Act ("FOIA") 5 U.S.C. 552 to block disclosure of records held by a governmental agency.

Petitioner's membership in the NCAA and the SWC is entirely voluntary. Its surrendering of documents to the NCAA and SWC was entirely voluntary. The NCAA and SWC have taken every possible measure to prevent disclosure of the documents and protect their member institutions. To allow a party situated as Petitioner to intervene would unduly burden the courts and the litigants.

CONCLUSION

It is undisputed that the ultimate objective of Petitioner in this case is identical to the ultimate objective of the existing parties in the lawsuit, namely nondisclosure of the documents requested by Respondents. The District Court and the Court of Appeals correctly applied the standard to be used in such a case and required that Petitioner show adversity of interest, collusion or nonfeasance on the part of the NCAA and the SWC. Petitioner was unable to do so. The standard applied by the Fifth Circuit is the standard it has consistently applied in such cases and is the standard which has been applied by each and every other Court of Appeals. Moreover, that standard has been authorized by this Court. The Court of Appeals correctly applied this standard to the facts before it and affirmed the denial of Petitioner's intervention without an evidentiary hearing. No such hearing was required in this case and the record was adequate to rule on Petitioner's intervention even in the

absence of an evidentiary hearing. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JACKSON, WALKER, WINSTEAD,
CANTWELL & MILLER
CHARLES L. BABCOCK
ROBERT P. LATHAM
6000 InterFirst Plaza
Dallas, Texas 75202
214/953-6000

ROBERT P. LATHAM
Counsel of Record for
Respondents
David Eden and
The Times Herald Printing
Company

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